RM

EMPLOYMENT TRIBUNALS

Claimant: **Mrs L Herring**

Respondent: **J Lovric Limited**

Heard at: **East London Hearing Centre**

On: **13 October 2020**

Before: **Employment Judge Gardiner**

Representation

Claimant: Mr R Taylor, solicitor
Respondent: Mr S Hoyle, consultant

REMEDY JUDGMENT

The judgment of the Tribunal is that:-

1. The Claimant is awarded the sum of £14,000 for the injury to her feelings caused by the two acts of pregnancy related discrimination contrary to Section 18 Equality Act 2010 established against the Respondent in the Tribunal's judgment dated 30 April 2019.

2. The appropriate percentage increase to the injury to feelings award for the failure to comply with the ACAS Code of Conduct on Disciplinary Procedures is 15%. This is an increase of £2,100.

3. Interest on the injury to feelings award as adjusted for failure to comply with the ACAS Code of Conduct is to be calculated at 8% per annum from 24 February 2018 onwards, which amounts to a cumulative interest rate of 21.08%. The award of interest over this period is £3,394.67.

4. No basic or compensatory award is payable to the Claimant in relation to her successful automatic unfair dismissal claim under Section 99 Employment Rights Act 1996.

5. The Claimant is awarded four weeks' pay, being 4 x £120 = £480 for the Respondent's failure to provide the Claimant with a statement of employment particulars, contrary to Section 38 Employment Act 2002.

6. The total sum payable by the Respondent is therefore £14,000 + £2,100 + £3394.67 + £0 + £480 = **£19,974.67**.

7. The Respondent's application for the total sum to be payable in instalments is refused.

REASONS

1. This is the Remedy Hearing to determine the remedy which should be awarded to the Claimant, Laura Herring, given the findings in her favour in our decision on Liability.

2. We have heard evidence from Mrs Herring and from her husband Edmund Herring. We have also read a statement from Mrs Herring's father-in-law, Peter Herring.

3. An agreed bundle of remedy documents was provided to the Tribunal. In addition, reference has been made at various points in the evidence to the original bundle from the liability hearing and to the original witness statement relied upon by Mrs Herring at that point. We have also been asked to remind ourselves of the evidence that was given on certain points at the liability hearing.

4. The Claimant's case as to the remedy she should be awarded is set out in a Schedule of Loss contained in the remedy bundle. The claim can be divided into two distinct sections.

5. The first is a claim for injury to feelings in relation to our finding that the Claimant suffered discrimination in two respects: in relation to the decision to issue the Claimant with a disciplinary sanction of a verbal warning for lateness, and in relation to the failure to carry out a risk assessment when the Claimant told her employers that she was pregnant.

6. In addition, we need to consider whether there has been a failure to comply with the ACAS Code of Conduct on Disciplinary and Grievance Procedures; and whether to award the minimum award or the higher award for the Respondent's admitted failure to provide the Claimant with a statement of employment particulars.

Discrimination – Injury to feelings

7. So far as an award of injury to feelings is concerned we first consider the injury to feelings resulting from the disciplinary sanction of a verbal warning.

8. The verbal warning was given in part because of her pregnancy related lateness. The warning was issued in a written disciplinary letter which she was asked to sign to confirm receipt. She was given this letter without any disciplinary procedure being followed, and receipt of the letter was the first time she realised that disciplinary action was being taken. The action that had prompted the verbal

warning was the Claimant's lateness on one particular day, namely 24 February 2018. She had not sought to hide her late arrival but had volunteered this to her line manager in a text message sent mid-morning, at 11:08. There is no evidence that her lateness had any consequences for the Respondent. At this remedy hearing the Claimant has given evidence that she was able to open the shop in time to serve the first customers of the day, and that evidence has not been challenged in cross-examination. The Claimant says, and we accept, that she felt unfairly treated in being denied the opportunity to explain why she was late.

9. She complained about the verbal warning in her written grievance dated 1 August 2018. She was invited to a grievance hearing but chose not to attend due to her ongoing illness. The outcome letter, dated 13 August 2018, dealt with this issue, but did not accurately reflect the Claimant's history in relation to lateness. As we have already found, she had only been late once before the instance where she had been disciplined, rather than twice as set out in the outcome letter. Contrary to the outcome letter, the second absence was pregnancy related. The failure to carry out any investigation into whether or not this was pregnancy related lateness would have compounded the injury to feelings caused by the original sanction.

10. Mr Hoyle has argued that the disciplinary sanction was not a major feature of the way in which she subsequently conducted herself. However, she had been off sick since 23 March 2018, within a month of the relevant incident, and had chosen to complain about it when issuing a grievance on 1 August 2018. In fact, it was the first of the nine matters raised during the grievance. We do not consider that the absence of any earlier complaint about the verbal warning is significant, given that several significant events had happened since, including the loss of her baby and ongoing serious health matters.

11. In relation to the failure to carry out a pregnancy risk assessment, this was a failure that spanned the period from notifying the Respondent of her pregnancy on 8 January 2018 until she went off on sick leave on 23 March 2018. The onus was on the Respondent to ensure the safety of all its employees particularly where manual handling was part of her role and she was in relatively close proximity to fuel tanks with the inherent risk of fuel spillages where motorists were refuelling. This was a particular risk where the Claimant was pregnant and liable to find manual work increasingly difficult as her pregnancy progressed. We have already found that there was no specific conversation with the Claimant as to the extent to which she was able to continue performing all aspects of her role. The Claimant is criticised by Mr Hoyle for not asking for a pregnancy risk assessment or raising her difficulties with the Respondent. We find that she chose not to do so because she was able to rely on her husband to help her with the heavier manual handling tasks and therefore did not need to carry out those tasks herself. In those circumstances we do not criticise the Claimant for failing to raise this matter with the Respondent. It is relevant to note that the Claimant had not been treated sympathetically in relation to her pregnancy related lateness but instead received a disciplinary verbal warning. As a result, she was entitled to lack confidence that particular action would be taken if she had chosen to raise it with Ms Johnson as her line manager. It is relevant to note that the failure in this case was a failure to carry out a specific statutory duty which was in place to safeguard her health and that of her baby.

12. Again she chose to complain about this failure in her grievance in the second of the nine matters raised in her grievance. The response did not engage with the specific criticism that there was a need for a pregnancy risk assessment. Rather it sought to minimise the extent of the manual handling required and referred to an alleged conversation that we have found did not take place. As a result, this would have increased the extent to which the Claimant's feelings were injured by this act of discrimination.

13. In both cases the fact that these issues were raised in a formal grievance some months after they first occurred, and in the first two numbered grievances, was evidence that she had not been able to move on from these events and that they were deeply felt.

14. In her witness statement the Claimant refers to events and feelings that were not included in the first witness statement. We do not agree with the criticism made by the Respondent that this was an exaggeration or embellishment of the true position. Rather it reflects the natural tendency to focus on her reaction to the events in a remedy statement, rather than the events themselves in the liability statement. However, we do note that in several places her witness statement refers to her general feelings towards the way she was treated by the Respondent, and in particular to her feelings about the repeated requests made for personal medical records, and her reaction to her dismissal. We disregard all injured feelings which were the result of events we have not found to be discrimination, including the act of dismissal itself.

15. We have regard to the Presidential Guidance updated in March 2020 as to the values of the three *Vento* brackets for injury to feelings awards. The lower bracket is from £900 to £9000 and the middle bracket from £9000 to £27000. Mr Taylor, the Claimant's solicitor has referred to previous first instance decisions on injury to feelings awards, but recognised that each case would turn on its particular facts.

16. Mr Hoyle argued that there should be two separate awards for each of the two acts of pregnancy related discrimination. He contended that both of the awards should be within the lower bracket, but did not put a figure on the amount that the Tribunal should award.

17. We consider that the appropriate figure for injury to feelings is £14,000 for the two acts taken together. In awarding this figure as a single figure rather than two separate figures, we note that the two acts occurred concurrently, and therefore the injury to feelings is difficult to compartmentalise. In addition, the injury to feelings in both cases was exacerbated by the way that they were treated in the same grievance outcome. An award of £14,000 falls well into the bottom half of the middle bracket *Vento* bracket, which is appropriate place for the award in this case.

Discrimination – financial loss

18. There is no claim for financial loss as a result of the two acts of discrimination. As a result, no sum falls to be awarded for financial loss.

Interest on discrimination award

19. Interest is payable on this award, which we consider should run from 24 February 2018. This is the date of the verbal warning and the midpoint of the period in which the Respondent ought to have carried out a risk assessment.

Unfair dismissal

20. There is no basic award payable because the Claimant did not have two year's continuous employment.

21. In relation to the compensatory award, the Claimant seeks over two years pay on the basis that she was unable to work during this time because of her health. As a result, she did not look for any alternative employment. We do not consider that the Claimant is entitled to recover any amount for her loss of earnings. She would not have been well enough to return to work until at least the end of October 2018. This is the date of the Claimant's last sick note. However, the Claimant's evidence is that she continued not to be well enough for the following two years. Therefore, we do not consider that she had any prospect of continued earnings and she would have been dismissed in any event on grounds of incapability. Insofar as the Claimant alleges that her sickness is the result of the Respondent's actions, she has not produced any specific evidence other than a letter from her GP dated 11 July 2019. This points to her ongoing ill health after the end of October 2018. However, in an unfair dismissal claim, financial loss which is the result of ill health is not recoverable by way of a compensatory award.

22. The Claimant has not claimed any sum for loss of statutory rights and so we have not made any award in this regard.

23. So far as the claim for the cost of a retraining course is concerned, this was not the Claimant's loss. It was paid for as a gift by the Claimant's mother-in-law. In any event, in all likelihood the Claimant would have engaged in this course even if she had not been unfairly dismissed. Whilst the decision to enrol on the course may have been triggered by the end of her employment with the Respondent, her employment would have ended in any event, and so too would her decision to enrol on this course and incur this expense.

24. The result is that there is no award for the automatically unfair dismissal contrary to Section 99 of the Employment Rights Act 1996.

ACAS uplift – Section 207A Trade Union & Labour Relations (Consolidation) Act 1992

25. So far as the ACAS uplift is concerned, we need to consider both the disciplinary process followed in relation to the verbal warning and the process that was followed in relation to the Claimant's grievance. We do not need to consider the dismissal process because the Claimant was dismissed on grounds of incapacity not for misconduct.

26. There was no process followed whatsoever in relation to the verbal warning. She was simply handed a disciplinary outcome letter. There was a process followed in

relation to the grievance. Whilst the Claimant did not attend the grievance hearing she was content for it to proceed in her absence, she was offered the opportunity to be represented at the hearing by a work colleague but chose not to take up this offer. The process was completed promptly, and the outcome letter addressed each of her points. Whilst Mr Taylor criticises the substance of the outcome this is not in itself a basis for finding that there has been a breach of the procedure. She was offered the right of appeal.

27. In all these circumstances it would be appropriate to make an adjustment to the awards made for failing to comply with the disciplinary process in relation to the verbal warning. We increase each of the awards by 15%.

Failure to provide a statement of employment particulars – Section 38 Employment Act 2002

28. The Claimant is entitled to either the minimal amount or the higher amount for the Respondent's failure to provide her with a statement of employment particulars: Section 38(2). We consider that it would be just and equitable to award the higher amount in the present case, because of the following. The Respondent appeared not to have provided the Claimant with a statement of employment particulars at any stage, nor did the Respondent provide any good reason why this was not done. The Respondent had sought advice in relation to employment matters during the Claimant's employment in relation to her sickness absence, and so ought to have been aware or advised of the need for employees to have a statement of employment particulars. This is four weeks at £120 which equates to £480.

Calculation of interest amount on discrimination award

29. The period from 24 February 2018 to the present day is 962 days, or 2.635 years. Interest is payable on this sum over the entire period at 8% per annum, which is a cumulative interest rate of 21.08%.

Summary

30. Therefore, the final figures are:

Injury to feelings :	£14,000
Uplift for ACAS failure :	£2,100
Interest on award :	£3,394.67
Failure to provide statement :	£480
Total	**£19,974.67**

Application for payments to be made in instalments

31. At the conclusion of the oral reasons given on the day of the Remedy Hearing, Mr Hoyle asked for the Judgment sum to be paid in instalments. The basis for the application was that the Respondent was in dire financial difficulties and may be unable to continue trading if required to pay the full amount within 14 days. He did not provide any jurisprudential basis for his proposition that the payment should be made in instalments, nor did he propose a particular pattern of instalments.

32. The Tribunal refused the application for payments to be made in instalments. No

persuasive reason had been given why the Tribunal should depart from the usual practice to order the full sum be payable.

Costs application

33. Both the Claimant and the Respondent indicated that they may wish to make a costs application. The Tribunal directed that any costs applications are to be made to the Tribunal within 14 days; and that the parties are to respond to each other's costs application within a further 14 days. Although Mr Hoyle had asked for 28 days in which to draft his submissions, the Tribunal considered that there was an important requirement of finality, given that the hearing relates to events which took place over two and a half years ago. Once any applications have been made, the Tribunal will reconvene to consider how to approach the costs applications. Mr Hoyle indicated he was willing for his costs application to be determined on paper without the need for a further hearing.

Employment Judge Gardiner

9 February 2021